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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1164.

HILLTOP REALTY, INC., *et al.*,

Petitioners,

vs.

SEATTLE FIRST NATIONAL BANK,
As Executor of the Estate of Laurence P. Smith, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE AUSTIN COMPANY IN OPPOSITION.

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This is not an anti-trust case. It is a common law fraud case against defendants other than The Austin Company.

OPINIONS BELOW.

The Opinion of the United States District Court, entered April 7, 1965, dismissing The Austin Company, as well as all other defendants, as to the alleged Federal anti-trust cause of action, is not mentioned in the Petition, nor printed as an appendix. The Decision of the Ninth Circuit Court of Appeals, rendered September 13, 1967, is reported in 383 Fed. 2d, 309, and is appended to the Petition, beginning at p. A-1. The Decision affirmed the District Court in holding no cause of action in violation of the anti-trust laws was stated.

JURISDICTION.

Jurisdiction here is invoked as to the Fourth Count of the Amended Complaint under 15 U. S. C., Sec. 15, the only count in which The Austin Company is mentioned.

THE QUESTION PRESENTED.

From a reading of the Petition, one can not tell whether The Austin Company is named a Respondent or not. It is referred to only as a "conspirator" with two department stores and the named Respondents, Larry Smith and Associates.

In the possible event that the Petitioners intend to include The Austin Company as a Respondent in this proceeding, we will answer the Petition.

Question No. 1 intimates that Petitioners were somehow deprived of a jury trial in their quest for treble damages for alleged violation of the Sherman Act.

STATUTES INVOLVED.

The only statute under which The Austin Company is charged is 15 U. S. C., Sec. 15.

STATEMENT OF THE CASE.

The Austin Company, an engineering and construction firm, with its principal place of business in Cleveland Heights, Ohio, owned a valuable tract of land in said suburb, originally called Longwood, which it believed would lend itself well to a large shopping center. It retained Respondents, Larry Smith and Associates, as consultants, to assist it in the development of such a shopping center. After several years of rezoning litigation and negotiations with the two best department stores in the

Cleveland area, it was publicly announced in January of 1959, that such stores, namely The Halle Bros. Company and The Higbee Company, had agreed to locate branch stores in what was to become known as the Severance Shopping Center. Having two department stores in one shopping center, for some reason, is advantageous in that business, and the same two stores had located branches in another suburb of Cleveland prior to this venture.

As the problems of negotiating leases for supporting stores and other details of shopping center development arose, The Austin Company concluded that shopping center development was not its business and asked its consultants, Larry Smith and Associates, to find a buyer for the property.

In September of 1959, general agreement was reached between The Austin Company and Larry Smith and Associates that the latter would buy the property and develop it for its own account. No public announcement of such agreement was made until July of 1960, since the agreement was contingent on Larry Smith and Associates obtaining financing.

The Severance property was in a white collar area of Cleveland's Eastern Suburbs. Nine miles north and east of Severance was the Nutwood Farm owned by the two Petitioners, now referred to as the Winslow Sisters. They had retained Petitioner, Hilltop Realty Company, to sell Nutwood Farm for them. Hilltop, being fully aware of The Austin Company's retention of Larry Smith and Associates, as consultants, and fully aware of The Halle Bros. Company and The Higbee Company decisions to locate branches at Severance, decided to retain Larry Smith and Associates to help in the development and/or sale of the Nutwood Farm, and in December of 1959, contracted for a feasibility report to be prepared by Larry Smith and

Associates. Larry Smith and Associates submitted their report which rather clearly indicated Nutwood Farm was not suitable for a regional shopping center and reduced the contract price of the report accordingly.

In April of 1960, Hilltop succeeded in selling the 175 acre Nutwood Farm, which bordered on a blue collar suburban area of Cleveland, for $3,500 per acre to purchasers in the shopping center business. No mention was ever made to the purchasers of any of the negative aspects of the Larry Smith and Associates' report.

When the announcement of Larry Smith's purchase of the Severance property, which carried with it the Halle and Higbee long term leases for branch stores, was publicly announced, toward the end of July of 1960, officers of Hilltop and the Winslow Sisters' lawyer, began communicating with Larry Smith and Associates. In January of 1963, they brought suit against Larry Smith and Associates in the United States District Court in Seattle, Washington, claiming in Count No. 1, fraud for failure to disclose Larry Smith's negotiations with The Austin Company to purchase the Severance property, breach of contract in Count No. 2, and violation of the Ohio anti-trust law in Count No. 3. An almost endless pretrial discovery program was then initiated.

It was only then that The Austin Company learned of Larry Smith's contract to submit a report on the Nutwood Farm, or even the existence of Nutwood. It has never been claimed, or alleged, that The Austin Company had any knowledge of Larry Smith's relationship with Hilltop or the Nutwood Farm. However, after several thousands of pages of depositions and microscopic examination of hundreds of documents by Hilltop's counsel, an Amended Complaint was filed in July of 1964, adding Count No. 4. The Austin Company was named as "Addi-

tional Defendant as to Count No. 4 Only," and it was then alleged that The Austin Company and Larry Smith and Associates had somehow conspired to violate the Sherman Anti-trust Law. The new prayer was for over $2,800,000 as to each of the four counts, but for treble that amount on Count No. 4.

Hundreds and hundreds of pages of more discovery depositions were taken, until they were finally brought to a halt. Larry Smith and Associates filed a Motion for Partial Summary Judgment and The Austin Company, a Motion to Dismiss. The United States District Court suspended all further discovery, although Hilltop's counsel had already filed notices for depositions to be taken of 44 additional witnesses.

In order to bring matters to a head, the District Court ordered Petitioners to file a complete statement of factual contentions on all counts. A very lengthy and detailed document was so filed. The only facts set forth, allegedly in support of an imaginary conspiracy between The Austin Company, the Respondents and the two department stores, were excerpts from documents found in Smith's files on discovery, intimating that if the two best department stores would agree to put branches in the Severance Shopping Center, thus "marrying the competition," a good successful shopping center might result, and, in all probability, a proposed competing one, two miles away, would not go forward. The documents referring to these views by Larry Smith and Associates were dated in 1957, or earlier. All this, however, had nothing whatsoever to do with Petitioners or Nutwood Farm since The Austin Company's participation in the hopeful development of the Severance Shopping Center had taken place long before Hilltop Realty thought of Nutwood as a shopping center site.

The District Court assumed the correctness of all the factual contentions, and held as a matter of law no violation of the anti-trust laws was presented and he entered judgment dismissing all of the defendants, including The Austin Company as to both Counts Nos. 3 and 4, stating,

> "The Court is of the opinion that these facts do not state a cause of action under the anti-trust laws. * * * By plaintiff's own allegations, its injury was caused by the fraudulent breach of a fiduciary duty."

Petitioners did not appeal this Decision of the District Court, but elected to try their case, based on the fraud and breach of contract counts, to the Court without a jury. The District Court held that the Petitioners failed in their burden of proof of damage and failed to prove that the Larry Smith report was false, but nevertheless held Respondents were guilty of fraud and it, therefore, awarded as damages the return of the contract report price, *twice*—once to Hilltop and once to the Winslow Sisters—punitive damages and attorneys' fees.

Respondents Larry Smith, et al. appealed and Petitioners cross-appealed and brought The Austin Company back into the case in an effort to reverse the District Court's earlier order dismissing the anti-trust counts. The Ninth Circuit Court of Appeals not only reversed the District Court in its judgment returning two-fold the price of the Larry Smith report and the awarding of punitive damages and attorneys' fees, but also affirmed the District Court in its dismissal of the anti-trust counts.

ARGUMENT.

Petitioners' claim of being deprived of a jury trial is absurd. Viewed in its true light, Petitioners are really asking the right to have a jury decide, as a matter of law, that some one has violated the anti-trust laws, and, therefore, should pay treble damages. The simple fact is that Petitioners could never get past the legal issue of failure to submit sufficient facts constituting a violation of the anti-trust laws.

The Petition should very simply be disposed of by one reading of the Court below's Decision, part of which we will refer to in the completion of our argument, as follows. (All reference will be to pages of Exhibit A attached to the Petition.) First in summary, the Court said, A-2:

> "On April 7, 1965, the District Court, on motion for summary judgment, dismissed the anti-trust counts (three and four). Hilltop and the sisters, *the plaintiffs, then waived jury trial as to the first and second counts, but not as to the third and fourth.* The action went to trial on July 20, 1965, before the court. The trial concluded on August 6, 1965. The record is voluminous; the Clerk's transcript contains 2456 pages of pleadings and other documents, and the reporter's transcript of the trial 2791 pages. Portions of at least 32 depositions were designated to be offered in evidence. The pre-trial order covers 362 pages. There are 371 exhibits, many with sub-exhibits. *It must be seldom that so monumental a paper structure has been built upon so thin a foundation as in this case.*" (Emphasis added.)

On pages 4 and 5, the Court said:

> "It is clear that the making of a false report by Smith, and a consequent sale of Nutwood at a price less than it was worth, are central to the claim stated in each count. Thus, as to the fourth, Sherman Act, count, it is stated that the purpose of the conspiracy

was to preclude the development of shopping centers other than Longwood on the east side of Cleveland, and that Smith therefore pursued and secured the contract to make a report on Nutwood and delivered a false report because 'discouragement of Nutwood was a necessary step to Smith's continued success * * * a favorable report on Nutwood would have meant competition' for Longwood.

"On these two central issues, the court made the following findings:

> " 'The court has not been persuaded that the conclusions reached in the Nutwood market analysis were wrong. * * * However, assuming arguendo that the report in and of itself would constitute fraud or breach of contract, the court finds that the plaintiffs have failed to establish by requisite burden of proof that as a result of such fraud or breach of contract the plaintiffs sustained any damage in the sale of the Nutwood Farm property * * *.
>
> " 'The plaintiffs also contended that but for the lack of a favorable market analysis they would have been able to find a buyer for Nutwood Farm who was willing to pay more than did Ridge Hills. On the state of the evidence adduced in this case, such contention amounts to no more than speculation or conjecture. Accordingly, the contract cause of action will be dismissed with prejudice.'

"These findings are fully supported by the record; by no stretch of the imagination can they be said to be clearly erroneous. That the conclusions of the report were correct and that the plaintiffs did not suffer the damages they claimed, is shown by the record almost to a moral certainty. * * *"

And finally on page 8, the Court said:

"But the plaintiffs argue that they were deprived of their rights to jury trial on the anti-trust counts in that: 'All of the Smith partners and Treiger were alleged to have violated the anti-trust laws on substan-

tially the same facts as in the fraud count. * * * A jury could find them guilty of the anti-trust violations, proximately resulting in substantial damages to the Winslow sisters and Hilltop from the sale of their property even though, on the fraud count, the court held that the burden of proof was not sustained.' (Page 21 of Hilltop's opening brief as cross-appellants.)

"The difficulty with this argument at this stage of the case is that *the alleged facts of fraud and damage are the same throughout the four counts of the complaint, and a favorable finding on both would be necessary to recover on either of the anti-trust counts. But plaintiffs voluntarily tried these issues to the court on the fraud and contract counts. They lost on both issues and we affirm the findings of the trial court.* Therefore, on remand plaintiffs would be estopped to reopen either of these issues by principles of res judicata and law of the case. See Partmar Corp. v. Paramount Pictures Theatres Corp., 1954, 347 U. S. 89, 100-101; Arnold v. Arnold, 9 Cir., 1966, 356 F. 2d 873; Warren v. Lawler, 9 Cir., 1965, 343 F. 2d 351; Clinton v. Joshua Hendy Corp., 9 Cir., 1960, 285 F. 2d 848, cert. den. 366 U. S. 932; Morgan v. Inter-Continental Trading Corp., 7 Cir., 1966, 360 F. 2d 853." (Emphasis added.)

Simply stated, there could not possibly be a cause of action against The Austin Company under the facts stated by Petitioner, nor is there any issue involving Petitioners' right to a jury trial. So far as the claimed issue presented is concerned, there is none. When the Petitioners, at the District Court's request, submitted every fact they could think of, and failed to state a cause of action in violation of the anti-trust laws, how can it be claimed that they were deprived of a jury trial? If the whole matter had gone to trial, with a jury demand on all counts, the result would have been the same. As a matter of law, Petitioners

could not prove a cause of action against The Austin Company, and, as it turned out, against anybody.

There is no basis for the granting of a petition for a writ of certiorari. The writ should be denied.

Respectfully submitted,

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